United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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74-2573

To be argued by
DAVIS A. DE PETRIS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2573

UNITED STATES OF AMERICA,
Appellee.

—against—

RAUL CASTELLANO and GILBERTO FERNANDEZ,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Of Counsel.

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Preliminary Statement

Appellants Castellano and Fernandez appeal from judgments of conviction entered November 22, 1974 and November 26, 1974 respectively, in the United States District Court for the Eastern District of New York (Mishler, *Ch.J.*), after a five week jury trial, which judgments convicted appellants of a conspiracy to import and distribute large quantities of heroin in violation of Title 21, United States Code, Sections 173 and 174.* Castellano was sentenced to seven

* The indictment charged seventeen defendants with a conspiracy to import and distribute large quantities of heroin from January 1968 to December 1970. Eight of the defendants are fugitives; four pleaded guilty (one of those four during the trial); one was severed; two were acquitted after trial (Teodoro Caceras and Jose Mendez); and one, Amado Lopez, escaped from the Federal Detention Center in Manhattan after he had been convicted and while awaiting sentence.

years imprisonment and Fernandez to five years imprisonment.

On this appeal, both appellants claim prejudicial pre-indictment delay. Appellant Fernandez also argues that the introduction of a prior similar act was reversible error. Appellant Castellano, in addition, argues that he was denied the effective assistance of counsel in that trial counsel failed to request a pre-trial identification hearing, that the magistrate erred in ordering him removed from Puerto Rico following an identity hearing, and finally, that the case should be remanded for an identification hearing.

Statement of Facts

A. Introduction.

Appellants were charged with and convicted of an ongoing conspiracy to import and distribute large quantities of heroin from January 1968 to December 1970. The role of the appellants in this massive narcotics operation can be briefly described as follows: appellant Castellano, a domestic distributor and Fernandez ("Toy Toy"), an assistant and confidante to one, Manuel Noa. Segundo Coronel, Manuel Noa and Roberto Arenas, co-conspirators who testified for the Government, held the following positions: Coronel, a wholesale distributor; Noa, a distributor and "stash" for the heroin and Arenas, an assistant and confidante to Coronel.

B. The Government's direct case.

The evidence offered at the trial through the testimony of Coronel, Noa and Arenas was in substance as follows:

In January 1968, in Madrid, Spain, Luis Calabrese, who was a fugitive at the time of trial, gave Segundo Coronel some money and an airline ticket to travel to the United States from Spain. Calabrese directed Coronel to obtain

for him heroin customers in the New York metropolitan area (T. 82-87).* A couple of months later Coronel met Manuel Noa in New York City by chance and they discussed Coronel's future heroin business and Noa's ability to obtain customers (T. 88-90, 803).**

In June 1968, one Florencio Gonzalez, who was in charge of heroin distribution in the United States met (through Calabrese) with Coronel in New York and the heroin distribution operation then began to bloom (T. 111-117). Initially, the quantity of heroin received by Coronel from Gonzalez was relatively small (two kilos) but it soon became apparent to Gonzalez that Coronel, through his connection with Noa and others, could "move" large amounts (T. 118-119, 130-132).*** From the outset, Noa's assistant and confidante, appellant Fernandez, helped to store the heroin which Coronel delivered to Noa, maintained and guarded the apartment in which it was stored, assisted in cutting the heroin and changed the smaller denominations of money received from customers into larger ones for payment to Coronel (T. 805, 807, 811).

In July 1968, Coronel met appellant Castellano (whom he had known since 1963 [T. 74]) by chance in New York and they discussed Coronel's heroin connection with Calabrese, Gonzalez and Romano. Appellant Castellano agreed to purchase some at a future date (T. 133-134). Subsequently, in August, 1968, Coronel received 10 kilos of heroin from Dino Romano, one of which he delivered to appellant Castellano. The remaining heroin was delivered to other customers, including Noa and appellant Fernandez. Appel-

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* References to "T" are to pages of the trial transcript.

** Over the next couple of months, Coronel continued in his attempts to obtain customers for Calabrese.

*** During the summer of 1968, Coronel was introduced to Dino Romano by Florencio Gonzalez. Romano was to take Gonzalez' place when the latter subsequently left for South America for reasons of ill health. (T. 136-137). Gonzalez has since died.

lant Castellano paid Coronel for the heroin over the next several days (T. 139-141).

In September 1968, Coronel received 25 kilos of heroin from Romano and distributed it to his customers including appellant Castellano, Noa and appellant Fernandez.* On that occasion, appellant Castellano received 2 kilos (T. 183-184).

Over the next several months, the operation continued to flourish with shipments of heroin arriving every twenty-five to forty days.** Coronel or one of his aides (Noa or Roberto Arenas) received approximately 25-30 kilos on each of these occasions and distributed it to the various customers (T. 185-187, 194, 198).*** Coronel testified that on some of the occasions when he delivered the heroin to Noa or received the money from him, appellant Fernandez was there (T. 186, 817). In February 1969, Castellano again received 2 kilos of heroin from Coronel (T. 199-200).****

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* Noa's testimony fully implicated appellant Fernandez in the receipt of that heroin, its preparation and, on occasion, its distribution (e.g. T. 811).

** Hilda Herrera, who worked with Arenas in a religious store, testified that she saw both Castellano and Fernandez in the store with Arenas or Coronel in 1968 or 1969 on different occasions (T. 2527-2533).

*** Noa testified that at the end of November, 1968, Coronel asked him to store all of the heroin from each shipment received and distribute it to Coronel's customers as per his instructions as well as his own customers. In order to be able to store such large amounts, Noa and appellant Fernandez built a large trap in the wall of the living room in the apartment which they used as a base for their own distribution network. A photograph of this trap was introduced at the trial (T. 811, 814, 889-891).

**** In the first half of 1969, Roberto Arenas received money for the heroin transactions from appellant Fernandez between eight and ten times and from Castellano twice (T. 1800-1805).

In the summer of 1969, Coronel sent Noa and Arenas to receive a shipment of heroin from Romano. From that shipment, Coronel and Noa delivered between 2 and 3 kilos of heroin to appellant Castellano and the remainder was sold to various customers of Coronel and Noa. Payment was made by Noa when he sent appellant Fernandez to Arenas with the money from the heroin he had sold. For his portion, Castellano paid Coronel a portion of the money owed and Arenas the balance (T. 818-819, 852, 859, 1806, 1808, 1911-1912).

In December 1969, another 25 kilos was received by Coronel from Romano. That heroin was subsequently distributed to several individuals including appellant Castellano who received five kilos from Noa on Coronel's instructions. Appellant Castellano paid both Arenas and Coronel for this purchase (T. 234-235, 875-881, 1913).

The operation continued with some minor problems until December 1970, when Noa was arrested.

C. Appellant Castellano's defense.

Appellant Castellano testified that he had known Coronel since 1965. Castellano admitted meeting Coronel by chance in New York in mid-1968 but denied having any heroin dealings with him and that he had seen Coronel subsequent to that chance meeting. He further denied even knowing Noa, Arenas and Hilda Herrera (T. 2223-2245). Appellant Castellano admitted being in New York in December, 1969 but stated that the purpose of the trip was to purchase a vendor's cart for his sugar cane business. After a luncheon recess, Castellano stated that he had been in New York not as above stated but rather at the beginning or end of 1970 (T. 2235, 2262).* In line with his defense of false identifica-

* Appellant's change in testimony was in apparent recognition of the fact that Coronel had testified to a chance meeting with him in June or July 1968 and both Coronel and Noa had testified to a five kilo delivery of heroin to him in December 1969 by Noa (T. 133-134, 234-236, 875-877).

tion, appellant Castellano testified that he knew another Castellano whose nickname was "El Fu" whereas, in contrast, his nickname was "El Bueno". Moreover, a certified copy of an indictment and judgment of conviction on heroin charges of this other Castellano was admitted into evidence (T. 2215-2216, 2219-2220).*

Juan Sanchez was called by appellant Castellano as a defense witness. He testified that he and Castellano had worked in a business in Puerto Rico from December 1968 to April 1969 (T. 2198, 2201). On cross-examination, Sanchez stated that he did not know if Castellano had been to New York and that he did not see Castellano from April-September 1969 (T. 2202-2205).

D. Appellant Fernandez' defense.

Appellant Fernandez testified in his own behalf. He stated that in 1961 he moved from Venezuela to New York, bringing approximately $5,000 with him (T. 2276-2277). He testified that his and Noa's family socialized with each other (T. 2280-2281). Further, he stated that in December 1968 he bought a Toyota with the financial help of his wife and mother-in-law (T. 2298, 2301). Appellant Fernandez testified that although he had met Coronel and Arenas he had never delivered money to them (T. 2291, 2324-2325). Fernandez further testified that he never received any money from Noa and never helped Noa build a trap to store heroin (T. 2296, 2326, 2390).

On cross-examination, appellant Fernandez, on the basis of being shown his and his wife's joint income tax returns, admitted to having a combined income in 1968 of $2,500, in 1969 of $3,576, and in 1970 of approximately $5,000

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* In all events, Noa testified that appellant Castellano's nickname was "El Fu" (T. 1658, 1695).

(T. 2337-2343). Fernandez further testified that his mother-in-law loaned him $2,000 in 1969 and $4,000 in 1970.* His mother-in-law worked as a waitress at a Horn and Hardart restaurant (T. 2341, 2343). When questioned about the purchase of a house by him in 1970, Fernandez admitted that the purchase price was approximately $26,000 of which approximately $10,000-$12,000 was paid by him from cash he had kept in his house.** His explanation for the source of the money was the $4,000 loan from his mother-in-law, the $4,000-$5,000 which appellant said he brought from Venezuela in 1961 (which he stated he did not spend in the nine years that elapsed and which he stated he kept behind a curtain in his apartment and later kept in a safe deposit box) and the remainder from his wife (T. 2344, 2346-2347, 2349, 2354-2360, but see, 2382-2386). Further, appellant Fernandez denied having delivered cocaine to Ramiro Gonzalez in 1970 or even knowing González (T. 2378).

In addition, Fernandez' wife testified that she and her mother had loaned Fernandez money to buy the house and the Toyota and in substance stated that Fernandez was not in the heroin business (T. 2422-2423, 2430, 2433).

Mario Pena testified as a character witness for Fernandez (T. 2474-2485) and in addition, one, Jose Cabezas testified that he, not Noa, had been living in the apartment (about which Noa had testified concerning the secret trap) since July, 1969 (T. 2570-2577).

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* On redirect, Fernandez stated he earned approximately $1,500 more in each of those years which he did not report (T. 2379-2382).

** The actual amount paid for the house over and above an existing mortgage which he took "subject to" was $14,000-14,500 (T. 2349).

E. The Government's rebuttal case.

In rebuttal, Ramiro Gonzalez testified in substance that appellant Fernandez delivered approximately three kilos of cocaine to him in mid-1970 in New York (T. 2704, 2714-2715).

POINT I

The lapsed time between the alleged criminal acts and trial did not deprive appellants of their Fifth Amendment rights of due process.

Appellants Castellano and Fernandez claim a violation of their due process rights because the indictment was opened in February, 1974, slightly more than three years after the last overt act alleged in the indictment. The actual chronology of events shows that the sealed indictment was handed down by the Grand Jury in January, 1974. Less than two months later, the first defendants were arrested and the trial of appellants, before Chief Judge Mishler, was begun on August 19, 1974. Thus, the total time elapsed between the opening of the indictment and the beginning of the trial was less than six months.

It is undisputed that the evidence contained in the sealed indictment was substantially based upon information received from Government witnesses Manuel Noa, Segundo Coronel and Roberto Arenas. Noa began his cooperation with the Government in early 1973 and Coronel and Arenas began to cooperate in mid-1973 (see Government's Exhibits 3500-1, 3500-6). Thus, nearly three years passed before the United States was in a position to begin its investigation.

In *United States* v. *Marion,* 404 U.S. 307 (1971), the defendant contended that a delay of more than three years between the occurrence of the alleged criminal acts and the filing of the indictment violated his Sixth Amendment right

to a speedy trial and his Fifth Amendment right to due process. The Supreme Court rejected the Sixth Amendment argument, stating that "the Sixth Amendment speedy trial provision has no application until the putative defendant in some way becomes an 'accused'." 404 U.S. at 313. Regarding the due process argument, the Court alluding to the concession of the United States, indicated "that the Due Process clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to [defendant's] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." 404 U.S. at 324. Thus, to succeed in a Fifth Amendment due process claim the appellants must at least show that they suffered actual prejudice in preparing a defense. As Justice White noted in the *Marion* case, a determination of actual prejudice in such an instance "will necessarily involve a delicate judgment based on the circumstances of each case." 404 U.S. at 325.

This Court has addressed itself to the question of precisely what is necessary to establish that pre-indictment delay resulted in prejudice to a defendant. In *United States* v. *Iannelli,* 461 F.2d 483, 485 (2d Cir.), *cert. denied,* 409 U. S. 980 (1972), this court held that a five year delay in bringing the indictment did not violate defendant's due process rights where the only prejudice claimed was that the defendant might have been able to locate additional witnesses if the indictment had been handed down sooner. The Court specifically labeled such a claim of prejudice as "too speculative" to permit a valid due process argument. 461 F.2d at 485.

In *United States* v. *Schwartz,* 464 F.2d 499 (2d Cir.), *cert. denied,* 409 U.S. 1009 (1972), the appellant claimed he was actually injured by pre-indictment delay because he was "lulled into a sense of security by the overall circumstances and the inordinate delay" [of almost five

years], and thus destroyed 50 to 60 files which he claimed were necessary to properly prepare his defense. This Court stated that the appellant "failed to factually establish that he has suffered any significant prejudice as a result of any delay which led to the destruction of the . . . files." 404 F.2d at 503.

The Government's delay in seeking the indictments herein was not "an intentional device to gain a tactical advantage over the accused" *United States* v. *Marion*, 404 U.S. at 324. The major witnesses in this case were three members of the conspiracy. Manuel Noa was arrested in December 1970 and did not begin to cooperate with the Government until February 1973. Noa testified against Coronel and Arenas at their trial in May and June of 1973. Coronel and Arenas did not begin to cooperate until after they were convicted. Thus, the Government did not possess sufficient evidence to proceed against the appellants herein until the later months of 1973. The rapidity with which the Government moved after the cooperation of Noa, Coronel and Arenas began is easily shown by noting that the indictment herein was handed down only three months after Noa testified before the Grand Jury and only one week after Coronel's testimony.

Other than alleging the dimming of memories, appellants have not shown how the pre-indictment delay prejudiced them. In a case involving a four year delay, this Court held that merely alleging the dimming of memories is not sufficient to show that the delay was a deliberate tactical device to gain advantage over appellants. *United States* v. *Ferrara*, 458 F.2d 868, 875 (2d Cir.), *cert. denied*, 408 U.S. 931 (1972). The statute of limitations is the primary guarantee against the bringing of stale charges. *United States* v. *Ewell*, 383 U.S. 116, 122 (1966). Thus, a defendant may obtain dismissal of the charges against him on the ground of unjustified pre-indictment delay only if he can establish real, actual prejudice to his defense from the

delay. *United States* v. *Marion,* supra; *United States* v. *Brown,* — F.2d — (2d Cir. Slip Op., 1847; decided February 20, 1975); *United States* v. *DeMasi,* 445 F.2d 251, 255 (2d Cir.), *cert. denied,* 404 U.S. 882 (1971); *United States* v. *Parrott,* 425 F.2d 972, 976 (2d Cir. 1968), *cert. denied,* 394 U.S. 989 (1969); *United States* v. *Feinberg,* 383 F.2d 60, 64-66 (2d Cir. 1967), *cert. denied,* 389 U.S. 1044 (1968). Under these cases, the mere allegation that the appellants could not recall where they were during the term of the conspiracy is insufficient in itself to establish prejudice.

In *United States* v. *Feinberg, supra,* and *United States* v. *Capaldo,* 402 F.2d 821 (2d Cir. 1968), *cert. denied,* 394 U.S. 989 (1969), this Court indicated that the internal operation of law enforcement agencies should not be scrutinized by the judiciary when no possible prejudice to the accused has been shown. "In short, fear of forfeiting a prosecution would frequently induce *unreasonable* speed which 'would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself,' *United States* v. *Ewell,* 383 U.S. 116, 120 (1966)." *United States* v. *Feinberg,* 383 F.2d at 67.

In this case, the Government has explained that the pre-indictment delay was due to the fact that the federal authorities did not become aware of the conspiracy until early 1973. Subsequent investigation and preparation for presentation to the grand jury required substantially less than one year. In this context, this Court has noted that "careful investigation, even at the price of delay, is to be cherished, inasmuch as 'the time-consuming investigation prior to an arrest minimizes the likelihood of accusing innocent parties and may facilitate the exposure of additional guilty persons.' *United States* v. *Feinberg,* 383 F.2d at 64-65." *United States* v. *DeMasi,* 445 F.2d at 255.

The mere allegation by defendants that they do not recall where they were when the events in question took place is not a sufficient showing of actual prejudice to constitute a deprivation of due process rights.

POINT II

The District Court did not abuse its discretion in admitting evidence of a prior similar act against appellant Fernandez.

On rebuttal the Government introduced evidence, through Ramiro Gonzalez, that appellant Fernandez delivered three kilos of cocaine to him in April or May of 1970 and that the cocaine had come from Manuel Noa (T. 2715). The trial judge did not abuse his discretion by admitting this evidence. "This court has held in a long line of cases that evidence of similar acts, including other crimes, is admissible when it is substantially relevant for a purpose other than merely to show defendant's criminal character or disposition." (citations omitted)." *United States* v. *Deaton*, 381 F.2d 114, 117 (2d Cir. 1967).* In deciding whether or not to admit evidence of prior similar acts the trial judge has wide discretion, *United States* v. *Feldman*, 136 F.2d 394, 399 (2d Cir. 1943); *United States* v. *Deaton, supra* at 118 n. 3.

Fernandez incorrectly attempts to apply *United States* v. *Glasser*, 433 F.2d 994, 1003 (2d Cir. 1971), *cert. denied*, 404 U.S. 854 (1972) to his case. That case prohibited the admission of prior crimes for which there had been no conviction *to impeach the credibility of a witness;* it had nothing to do with the doctrine of prior similar acts.

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* For this court's most recent decisions in this area; see *United States* v. *Gerry*, (2d Cir. Slip. op., 2583, 2599-2600; decided March 28, 1975); *United States* v. *Drummond*, — F.2d — (2d Cir. Slip op., 1781; decided January 11, 1975); *United States* v. *Papadakis*, — F.2d — (2d Cir. Slip op., 1231; decided January 10, 1975); *United States* v. *Carroll*, — F.2d — (2d Cir. Slip. op., 5963; decided January 6, 1975).

In this case the defendant took the stand and denied that he had ever picked up money for Manuel Noa (T. 2324). The Government's evidence showed appellant to be Noa's assistant. Through the testimony of Gonzalez, Fernandez was described as the man who delivered three kilos of cocaine to Gonzalez at the direction of Noa.* While this act was not the same as charged it was similar in that it showed Fernandez as one who ran errands for Noa and did his bidding.

Appellant Fernandez also argues that the evidence should not have been admitted as he was charged in a heroin conspiracy and the prior similar act testimony concerned cocaine. The evidence must be similar not identical. This Court in *United States* v. *Adams,* 385 F.2d 548, 551 (2d Cir. 1967), a case in which the defendant was charged with the sale of cocaine, found nothing improper with the testimony of an agent who testified as to a conversation he had with the defendant concerning a possible transaction in heroin. The Eighth Circuit in *O'Reilly* v. *United States,* 486 F.2d 208 (8th Cir.), *cert. denied,* 414 U.S. 1043 (1973), found nothing wrong, where the defendant was accused of selling cocaine, with showing that he possessed syringes and needles, even though they are normally used with heroin and not cocaine. Thus, there was nothing improper in admitting evidence of a cocaine transaction in order to show Fernandez' state of mind during the heroin conspiracy.

Finally, appellant argues that because the evidence against him was overwhelming, the Government did not need the additional evidence of his other drug dealing. However, a careful analysis of the evidence indicates that

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* Fernandez on cross-examination denied having delivered cocaine to Ramiro Gonzalez or even knowing him (T. 2365, 2378). There was no objection when these questions were asked. It was only on re-cross when a picture of Gonzalez was shown to Fernandez and the question re-submitted to him that an objection was noted (T. 2397).

the Government's case against Fernandez rested mainly on the testimony of Manuel Noa. Coronel saw Fernandez bring packages to Noa (T. 225) and Noa told Coronel that Fernandez changed money for him (T. 186, 224).* Noa testified that Fernandez was his assistant since 1966 (T. 805, 811), helped him build a trap in his home to store the heroin (T. 809) and got lactose and quinine for Noa to use in cutting the heroin. Noa also testified that Fernandez helped him in his cocaine business (T. 805). Arenas testified that while Coronel was out of the city from January to April 1969 Fernandez delivered money to him from Noa and for Coronel (T. 1805). Thus, this was not a case where the other crimes evidence was "thrown on scales already heavily tipped against the defendant." The Government had a real need to bolster their case and take it back from the precipice to surer ground. *United States* v. *Bradwell,* 388 F.2d 619, 622 (2d Cir.), *cert. denied,* 393 U.S. 843 (1968).

POINT III

Appellant Castellano's trial counsel cannot be held incompetent for failing to request a pre-trial identification hearing which would have been fruitless.

Appellant Castellano in Point IV of his brief argues that his trial counsel was incompetent for failing to request a pre-trial hearing. In Point III of his brief, Castellano follows up this request with an argument for remanding his case for such an identification hearing.

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* Appellant's reference to page 178-180 of the trial transcript does not refer to appellant Fernandez but to a co-conspirator Rogelio Fernandez.

In the Government's view, both contentions are equally absurd because, even had a hearing been held,* it is difficult to perceive how such a hearing could have altered the testimony at the trial or the jury verdict. It is clear that all of the Government witnesses had met with Castellano on several occasions.** Thus, the only possible issue as to the identification of appellant was that of false rather than mistaken identity which was thoroughly explored by Castellano's counsel at the trial.

POINT IV

There was no error committed during the removal proceedings concerning appellant Castellano.

"Assuming that in the removal proceedings there was not a complete compliance with Rule 40 of the Federal Rules of Criminal Procedure, it is well settled that the jurisdiction of the court in which an indictment is found

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* We doubt that a *Wade-Simmons* type hearing is required where the only danger involves the deliberate falseness of a witness' identification as opposed to a mistaken identification. Further, even had such a hearing been available, it is difficult to see how trial counsel's failure to make a request for such a hearing would "shock the conscience of the Court and make the proceedings a farce and mockery of justice." *United States* v. *Yanishefsky*, 500 F.2d 1327, 1333 (2d Cir. 1974); see *United States* v. *Currier*, 405 F.2d 1039 (2d Cir.), *cert. denied*, 395 U.S. 914 (1969).

**Coronel testified that he first met Castellano around 1963 in Puerto Rico (T. 74) and that appellant was the Castellano with whom he had dealings (T. 336). Noa testified that he knew appellant as "El Fu" (T. 1658, 1695), that he had met him for the first time in June 1969 (T. 802), and that appellant was the man with whom he had heroin deals. (T. 852-853). Arenas identified Castellano as having paid him money several times in 1969 (T. 1803). He further testified that he knew him as "Castee" (T. 1803). Thus, while appellant was known by more than one nickname, there was no question as to the identity of appellant.

is not impaired by the manner in which the accused is brought before it. The fact that the arrest was unlawful or the removal proceedings illegal would not affect such jurisdiction." *Klink* v. *Looney,* 262 F.2d 119, 121 (10th Cir. 1958); see *Ker* v. *Illinois,* 119 U.S. 436 (1888); *Frisbie* v. *Collins,* 342 U.S. 519 (1952).

Furthermore, if there was any wrongdoing in the Puerto Rico hearing, appellant Castellano should have raised the issue prior to the trial and his failure to do so and his entering of a plea of not guilty constituted a waiver of any objection he may have had to the District Court's jurisdiction over him. Any alleged violations of Rule 40 cannot now nullify the subsequent proceedings. *United States* v. *Woodring,* 446 F.2d 733, 737-738 (10th Cir. 1971). *Evans* v. *United States,* 325 F.2d 596, 602 (8th Cir. 1963), *cert. denied,* 377 U.S. 968 (1964).

In any event, however, there was nothing improper about the removal proceedings in Puerto Rico. Where an indictment against the arrestee has been returned, a warrant of removal may issue simply "upon production of a certified copy of the indictment and upon proof that [the arrestee] is the person named in the indictment." Fed. R. Crim. P. 40(b)(3).

Appellant Castellano claims that several issues were not considered by the Court in Puerto Rico: (1) there was no contention that the confidential informants testimony was reliable; (2) that DEA Agent Featherly was inaccurate in stating that one of the confidential informants knew appellant as "Fu"; (3) that only one photo was shown to the confidential informant and not a series of photos; and (4) that the Government failed to supply the identity of the confidential informants at the hearing.

None of the issues brought up by these contentions have any place in a removal proceeding, and several of them are

factually inaccurate. *First,* Castellano incorrectly states that the three confidential informants had never testified for the Government before. Coronel and Noa testified before the Grand Jury which resulted in an indictment being brought against appellant and others. Noa had testified at the trial of Francisco Toscanino, Segundo Coronel and Roberto Arenas which testimony along with other evidence resulted in their convictions; and *second,* Noa consistently throughout the trial testified that he knew Castellano as "El Fu" (1658, 1695, 1754). Thus, as properly stated the facts in this case are similar to *United States* v. *Johnson,* 45 FRD 427, 429 (D.C. Nev. 1968), there too the testifying agent had not met the defendant until the removal proceeding and the Court found no basis to find non-compliance with Rule 40 where the only testimony at the hearing was based upon an out of court photographic identification.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

Dated: April 9, 1975

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
DAVID A. DE PETRIS,
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*Of Counsel.**

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* The United States Attorney's Office wishes to acknowledge the assistance of Jon M. Lewis and Stephen E. Messinger in the preparation of this brief. Mr. Lewis is a June 1974 graduate of St. John's University Law School. Mr. Messinger is a third year student at Brooklyn Law School.

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AFFIDAVIT OF MAILING

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COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 10th day of April 1975 he served ~~xxxxx~~ two copies of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Stuart R. Shaw, Esq.
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New York, N. Y. 10022

Alan Hirshman, Esq.
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Brooklyn, N. Y. 11201

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
10th day of April 1975

Irene B. Cohen
IRENE B. COHEN
Notary Public, State of New York
No. 24-0683965
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1977